92-1086

No._____

Supreme Court, U.S.
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IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM 1992

BOB THOMAS,
Petitioner,

vs.

THE CITY OF HOUSTON, TEXAS
Respondent.

Petition for Writ of Certiorari
to the
United States Court of Appeals
for the Fifth Circuit

Petition for Writ of Certiorari

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38 pgs

QUESTIONS PRESENTED

1. Whether a municipality may insulate itself from civil liability by a delegation of employment decision-making authority to junior officers within a police department?

2. Whether several instances of retaliation, though individually insufficient to create municipal liability, can cumulate to a point that a significant constitutional injury occurs, giving rise to municipal liability?

3. Whether a pattern or practice of retaliation for the exercise of protected speech can be established by expert and/or historical testimony as to the common practice or procedure within the department?

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THE PARTIES

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The City of Houston, Texas, Respondent

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August 4, 1992)

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Petition for Rehearing Denied
NO. 91-2601 (5th Cir.
September 1, 1992)

JURISDICTIONAL STATEMENT

The jurisdiction of this Court is invoked pursuant to Supreme Court Rule 13.4. This Petition is timely filed within ninety days after the Petition for Rehearing was denied. The underlying basis for jurisdiction is Title 28, Section 1254 (1).

BASIS FOR THE CAUSE OF ACTION

This case involves a claim of retaliatory transfers and other retaliatory treatment by the Houston Police Department in violation of Petitioner's property and liberty interests guaranteed by the Fourteenth Amendment of the United States Constitution and enforceable under Title 42, Sections 1983 and 1988. (See appendix for text.)

SUMMARY OF THE ARGUMENT

The Circuit Courts have developed diverse and inconsistent interpretations of the doctrine established by this Court in Monell v. New York City Department of Social Services, 436 U.S. 658 (1978). Three critical concepts need to be addressed by this Court so that rights secured by the United States Constitution are uniformly enforceable and available to all citizens of this nation.

First, the Fifth Circuits own rulings are internally inconsistent. Compare Bowen v. Watkins, 669 F. 2d 979, 989-90 (5th Cir. 1982) and Thomas v. City of Houston, No. 91-261 (5th Cir. Sept. 1, 1992). In Bowen, the final authority for employment decisions rested with the Chief of Police. The Bowen Court ruled that "If Chief of Police Watkins is the

final authority in this area, and his choices represent municipal policy, the municipality is liable for any Section 1983 violation for which he is liable." Yet in Thomas, although the evidence showed that the final employment decision rested with the Chief of police, and that the Chief of Police routinely and as a matter of official Police Department policy directed lower level officers such as Lt. Webber to carry out the employment decisions actually made at a higher level, the Fifth Circuit reversed the proper ruling and decision of the District Court.

Second, the Fifth Circuit ignored the evidence which showed that the Petitioner had been repeatedly retaliated against during a two year span of his employment with the Houston Police Department. This

second issue technically subdivides itself into two questions:

(a). Can retaliation be shown by evidence which conclusively demonstrates that the Petitioner's continuing exercise of his right of free speech and political franchise was a but-for-cause of the Petitioner's disciplinary transfer and denial of seniority?

(b). Can the Petitioner establish that multiple acts by the Respondents were motivated by an intent to retaliate for the Petitioner's exercise of protected activities and create municipal liability for the overall conduct even if no individual incident might be sufficient to establish municipal liability?

Paragraph "a" (above) addresses the question of whether or not circumstantial evidence of repeated adverse employment

treatment which directly correlates to repeated public exercise of fundamental rights (freedom of speech and political advocacy) can ever be sufficient to support a jury finding of a municipal policy to retaliate against officers for the exercise of their fundamental rights. The evidence in this case showed that each time the Petitioner spoke out on a matter of general public concern, the Houston Police Department retaliated by in one way or another taking away or destroying the employment rights his years of seniority and hard work had earned.

This Court established an elevated requirement for the imposition of liability on a municipality. However, the District Courts have, at times, chosen to interpret that elevated burden

of proof into a grant of absolute immunity. Only a clarification from this Court of how municipal liability may be established will provide for a reasonably consistent interpretation.

Paragraph "b" (above) asks this Court to address for the first time the question of whether what might individually be referred to as minor transgressions of the Petitioner's rights can have a cumulative effect sufficient to meet the elevated requirements of the imposition of liability on a municipality. In this case the Petitioner suffered a cumulative loss of rights, privileges and income with each additional act of retaliation. Although the Fifth Circuit's opinion addresses only one of the retaliatory acts and holds that retaliatory act was not

committed by an official policy maker for the City of Houston, that ruling completely misses the more valid intellectual ground which had been properly presented to the Court of Appeals. Even if that one act of retaliation was not directly committed by an official policy maker for the City of Houston, it was approved and thereby ratified in advance by the Chief of Police and his direct instructions to Capt. Schumann.

Third, several officers and a well respected expert and historian on police matters in the State of Texas testified as to the custom or policy of transferring an officer in retaliation for the exercise of free speech. Clear testimony showed a history of more than forty years of retaliatory transfers

because of union activities. The Fifth Circuit by the effect of its ruling has determined that such evidence is not relevant, and a matter of law is insufficient as a basis for municipal liability.

Argument

The Petitioner, Bob Thomas (Thomas), respectfully submits that the panel in the United States Court of Appeals for the Fifth Circuit was mislead by the statement of facts submitted by the City of Houston in their principal Brief for the Appellant and thereby caused the court to overlook or misapprehend the additional true facts of municipal liability. The City of Houston (City) strategically elected to limit their two page statement of facts to the transfer of Thomas that occurred in September, 1983. The City did not mention or refer to the transfer of Thomas that occurred in June, 1981. Thomas alleged that this transfer (June, 1981) was the most egregious incident of misconduct by the City and meets all of the elements of

Monell vs. New York City Department of Social Services, 436 U.S. 658 (1978) and Bowen vs. Watkins, 669 F.2d 979 (1982).

Judge Jolly, in his opinion, limited his discussion of the facts to the transfer of September, 1983 and apparently based the judgment in favor of the city on the limited set of facts presented by the city in their principal and reply appellant brief. Therefore, the petitioner is of the opinion that the Court of Appeals has overlooked or misapprehended the total set of facts of this case.

The September, 1983 transfer was only a small excerpt of the testimony presented during the eleven days of the trial. During the trial, a total of twenty-nine (29) witnesses testified and the transcript of the trial consisted of

one thousand four hundred twenty-seven pages (1,427) of testimony compiled in nine (9) volumes.

The City vigorously objected to the testimony regarding the June 1981 transfer. In fact, the City, via their principal appellant brief, alleged that the district court abused its discretion in admitting Plaintiff's Group Exhibit #7 (tape recordings of the Houston Police Department deputy chiefs who elected to transfer Thomas in retaliation for his union activities). However, once again the City shrewdly did not reveal the true contents of the exhibits and the testimony regarding the exhibits which clearly and undisputedly proved that the transfer of Thomas in June, 1981 was a policy and or practice of the city or police department of discriminating

against employees who engage in protected speech.

Deputy Chief of Police Mitchell Gibson admitted in a taped telephone conversation that the decision to transfer Thomas was made by the command staff at a June 3, 1981 meeting. (Plaintiff's Exhibit #7). Further, the testimony at trial included Chief Gibson admitting that the transfer of Thomas was a policy or custom of the police department of discriminating against employees who engage in protected speech. Chief Gibson admitted that the transfer of Thomas was a combination of factors; Thomas' article in the union newspaper criticizing Chief of Police Johnson (Plaintiff's Exhibit #6); Thomas' union activities on behalf of patrolmen and detectives; and the grievance bill (Texas

House Bill 1115).

The petitioner respectfully addresses the justices to Plaintiff's Exhibits 1 and 2. In these exhibits (dated June 8, 1981), the chief of police responds to the plaintiff's grievance and gives final approval to the transfer. Therefore, pursuant to Bowen vs. Watkins, 669 F.2d 979, 989 (5th Circuit 1982) the municipal liability for the City attached for job action against a policeman because the decision by one exercising final authority was proved clearly and uncontrovertedly by these exhibits.

At some level of authority, there must be an official whose acts reflect governmental policy, for the government necessarily acts through its agents. Thus, the question becomes one of identifying the official who has

authority to make policy; then municipal liability attaches to acts performed pursuant to that policy. Bowen vs. Watkins, 669 F.2d 979, at 989 (1982).

The long standing policy or custom of the City of discriminating against employees by transfers was proven by the uncontested and uncontroverted testimony of two witnesses.

Lt. Garvis Gilbert, a thirty-five (35) year veteran of the Houston Police Department, and the senior ranked lieutenant with twenty-eight (28) years of in-grade tenure, testified that the command staff had a long standing practice of transferring officers for disciplinary reasons. He stated that it was a fact of life. Assistant Chief of Police Thomas Koby testified in response to a question by the city attorney that

even he had received a disciplinary transfer (1978) and that disciplinary transfers were still a fact of life at the time of trial. Further, he testified that disciplinary transfers did not violate the rules and policies and procedures of the Houston Police Department (Vol. 4, pg. 107). Chief Koby wa a twenty-one (21) year veteran of the Houston Police Department, who at the time of trial, supervised approximately 2,700 officers or 68% of the department. (Vol 4, pg. 77).

Lt. Gilbert, the immediate supervisor over Thomas, testified that the June, 1981 transfer was "unusual" and it was the only occasion that an officer under his supervision had been transferred by the command staff without his recommendation or permission (a span of

28 years) (Vol. 3, pgs. 32-35).

The evidence submitted to the jury and the trial judge clearly showed that the deprivation of the First Amendment Rights of Thomas was the result of a long standing City policy or custom; that the municipal liability of the City attached because the decision to approve the transfer was made by the Chief of Police, B. K. Johnson, who exercised the final authority for the City; and that the City of Houston Police Department had a policy or custom of discriminating against employees who engage in protected speech that dated as far back as 1950.

Sgt. Bill Elkin, a thirty-six and one-half year veteran of the Houston Police Department, testified in response to a question proposed by the City of Houston attorney, that his father had been the

victim of deprivation of rights because of union activities in the early 1950's (Vol. 3, pgs. 55-56).

Mr. Ron Delord, the expert witness for the plaintiff, testified that transfers were the most common use of discipline by cities or police departments in Texas to deprive an officer of his first amendment rights when the officer was critical of a decision by a command staff and spoke out on matters of public concern. Further, his testimony established the policy or custom of the city or police department of discriminating against employees who engage in protected speech. Once again, the City did not offer any evidence to refute or contradict the testimony of the witnesses Elkin, Delord, or Chief Koby.

The plaintiff Thomas suffered

additional acts of retaliation for the exercise of his first amendment rights as the elected president of the Houston Police Department Patrolmens' Union.

On January 24, 1983, Thomas was the only police officer on his shift of 97 officers to be denied his seniority rights. Once again, the deprivation of the first amendment rights of Thomas was in retaliation for his speaking out on a matter of public concern, i.e., the special treatment provided by the Houston Police Department to the private security patrol of the River Oaks neighborhood.

Further, Thomas was subjected to additional deprivation of his first amendment rights by a Deputy Chief of Police, Fred Bankston, in December, 1981. Chief Bankston initiated his own "personal investigation" of Thomas

because of statements Thomas made at a press conference. The press conference was conducted by Thomas as president and spokesman for the Houston Police Patrolmen's Union. Chief Bankston gave a press conference in his office at the police station "because the union alleged a coverup in an investigation of Assistant Police Chief Tommy Mitchell." Chief Bankston admitted in his testimony that he recommended disciplinary action against Thomas because of his conduct as president at the union press conference.

The petitioner further asserts that the court has overlooked or misapprehended the evidence concerning the September, 1983 transfer of Thomas as discussed by Judge Jolly in his opinion. We stipulate that as a general rule a lieutenant of police does not normally exercise final

authority in the setting of official personnel policies and whose decision cannot be said to be municipal policy. But in this fact situation, the evidence was uncontroverted that the lieutenant who transferred Thomas in September, 1983 had been expressly and specifically delegated the final authority to implement the transfer. Capt. Dennis Schumann a defendant, testified that Lt. Webber had full authority to assign Thomas "wherever he wanted", "for whatever reason", as delegated to Lt. Webber by Captain Schumann and "by the rules of the department."

Further, in this fact situation, after Thomas spoke out on matters of a public concern, Chief of Police Lee Brown called Capt. Schumann to his office; that Chief Brown expressly and specifically

delegated his authority to Captain Schumann; Captain Schumann reported directly to Chief Brown and expressly and specifically delegated his authority to Lt. Webber; and Lt. Webber transferred Thomas.

> **If a higher official has the power to overrule but as a practical matter never does, the decision maker may represent that effective final authority on the question.**
>
> Bowen vs. Watkins, 669 F.2d 979, at 989 (1982).

Certainly the uncontroverted testimony of a defendant that the lieutenant had final authority to transfer Thomas pursuant to the expressly delegated authority of the Chief of Police and the "rules of the department" satisfies the burden established by Bowen.

CONCLUSION

THEREFORE, the petitioner humbly pleads and prays that this honorable Court grant this petition for Writ of Certiori.

Respectfully submitted,
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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 91-2601

BOB THOMAS,

Plaintiff-Appellee

versus

HARRIS COUNTY,

Defendant

CITY OF HOUSTON,

Defendant-Appellant

Appeal from the
United States District Court for the
Southern District of Texas

(H-83-3542)

Before JOLLY and DUHE, Circuit Judges,

and PARKER, District Judge.*

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*Chief Judge of the Eastern District of Texas, sitting by designation.

E. GRADY JOLLY:**

The City of Houston, Texas, appeals a jury verdict awarding damages to policeman Bob Thomas. Thomas sued the city and others under the Civil Rights Act of 1871, 42 U.S.C. § 1983, for damages he claims to have suffered because of a personnel transfer that he contends was in retaliation for his exercise of the First and Fourteenth Amendments. The jury awarded him $50,000 in damages against the city, based solely on his claim that his transfer was in violation

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**Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not

be published.
of his rights under the First Amendment. He was then awarded attorneys' fees and prejudgment interest. We reverse. Thomas's damages were awarded againstb the city under 42 U.S.C. § 1983, based upon his claim that a transfer from one division to another in the Houston police department was in retaliation for his speech on matters relating to the police officers' union and other subjects of public concern. In order to prevail against the city under section 1983, however, Thomas was required to prove that this transfer was the result of an official policy or practice. Monell v. New York City Police Department of Social Services, 436 U.S. 658 (1978)(municipal liability under 42 U.S.C. § 1983 for deprivation of rights under color of

state law cannot be based on respondeat superior, but requires proof that the deprivation was the result of a governmental policy or custom).

The evidence showed that the decision to transfer Thomas was made by a lieutenant in the police department who did not exercise final authority in the setting of official personnel policies and whose decisions cannot be said to be municipal policy. See Bowen v. Watkins, 669 F.2d 979, 989 (5th Cir. 1982)(municipal liability for job action against policeman attaches only by decision of one exercising final authority). After a careful review of the record, we can find no basis for finding that Thomas has established a policy or custom of the city or police department of discriminating against

employees who engage in protected speech. Therefore, we can find no basis by which the city can be held liable under section 1983 for the acts that Thomas alleged occurred.

Accordingly, we VACATE the judgment, REVERSE, and RENDER judgment in favor of the city.

VACATED, REVERSED, and RENDERED

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 91-2601

BOB THOMAS,

Plaintiff-Appellee

versus

HARRIS COUNTY,

Defendant

CITY OF HOUSTON,

Defendant-Appellant

Appeal from the
United States District Court for the
Southern District of Texas

ON PETITION FOR REHEARING

(SEPTEMBER 1, 1992)

Before JOLLY and DUHE, Circuit Judges and PARKER*, District Judge.

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*Chief Judge of the Eastern District of Texas, sitting by designation.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entotled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

(Original signed by Judge Jolly)
UNITED STATES CIRCUIT JUDGE

Supreme Court, U.S.
FILED
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(2)

NO. 92-1086

IN THE UNITED STATES SUPREME COURT OCTOBER TERM, 1992

BOB THOMAS,
Petitioner

v.

THE CITY OF HOUSTON, TEXAS,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF OF OPPOSITION

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NO. 92-1086

IN THE UNITED STATES SUPREME COURT OCTOBER TERM, 1992

BOB THOMAS,
Petitioner

V.

THE CITY OF HOUSTON, TEXAS,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF OF OPPOSITION

The Respondent City of Houston, Texas, respectfully requests that this honorable Court deny the Petition for Writ of Certiorari seeking review of the Fifth Circuit's opinion in this case.

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COUNTERSTATEMENT OF THE CASE

This lawsuit was filed by Robert Thomas (hereinafter referred to as Petitioner or Thomas) against the City of Houston, Harris County, and a number of individual employees of the defendant city and county governments. The suit was filed on June 3, 1983, pursuant to 42 U.S.C. §1983. Summary Judgment was granted for all Defendants on September 4, 1984. The Court of Appeals affirmed the decision regarding Defendants John Holmes and Harris County and reversed regarding the City of Houston and its named employees. Thomas v. Harris County, 748 F.2d 648 (5th Cir. 1986). Eventually all City of Houston employees were dismissed in their individual capacities.

The case was tried before a jury on a First Amendment Complaint and the Court overruled Defendant's Motion for Directed Verdict. The Jury rendered a verdict in favor of the Plaintiff Thomas against the City of Houston. The Court overruled Defendant's Motion for Judgment Notwithstanding the Verdict. On May 17, 1991, the Court rendered a Final Judgment in favor of Plaintiff Thomas.

The City of Houston gave timely notice of appeal on May 31, 1991, to the Fifth Circuit Court of Appeals. The Court of Appeals reversed the District Court on August 4, 1992, and rendered judgment in favor of the City, finding no basis by which the City could be held liable under §1983 for the acts that Thomas alleged occurred.

Thomas filed a Petition for Writ of

Certiorari on December 12, 1992. Petitioner bases his argument for review of the Appellate Court's decision upon an alleged discrepancy between the Circuit's decisions on the issue of municipal liability under §1983. He also alleges that the Court of Appeals failed to consider evidence that incontrovertibly proves his contentions.

REASONS FOR DENYING THE WRIT

I. The Court of Appeals correctly applied the requirements of Monell v. New York City Dept. of Social Services, 436 U.S. 658 (1978) and its progeny in finding that the mere delegation of decision-making authority does not subject a municipality to civil liability under §1983.

This case is not one meriting review by this Honorable Court. Petitioner has not established any of the considerations set forth in this Court's Rule 10. The

jury in this case found that "Plaintiff's exercise of free speech was a substantial or motivating factor in Defendants' decisions to transfer or re-assign Bob Thomas to different positions within the Houston Police Department, deny him seniority status, or subject him to other acts of a retaliatory nature." However, the jury was instructed that the term "Defendants" could include seven individuals and the City of Houston. The Court of Appeals reversed the imposition of municipal liability upon determining that the defendant found to have implemented the retaliatory decision was not one whose actions could impose such liability. The jury findings included no indication of a widespread policy or practice of retaliatory treatment which would impose liability upon the City in

the absence of such a decision by a policy-maker.

Despite his suggestions to the contrary (Petition at 9, 11-12.), the decision of the Court of Appeals is not in conflict with its other decisions or the decisions of this Court. Any inconsistency with Bowen v. Watkins, 669 F.2d 979 (5th Cir. 1982) is fully mandated by this Court's decision in City of St. Louis v. Praprotnik, 485 U.S. 112 (1988). The Court of Appeals in Bowen found that "If a higher official has the power to overrule a decision but as a practical matter never does so, the decision-maker may represent the effective final authority on the question." Bowen, 669 F.2d at 989. Subsequently this Court in Praprotnik held to the contrary: "Simply going along

with the discretionary decisions made by one's subordinates...is not a delegation to them of the authority to make policy." City of St. Louis v. Praprotnik, 485 U.S. 112, 130 (1988). This Court's 1988 decision effectively reversed that portion of the Bowen decision and foreclosed any need for further review of that issue in the present case.

The courts have consistently held that to establish an official policy for municipal liability, a Plaintiff must show a deliberate course of action consciously chosen by an official with policy-making authority or alternatively a widespread practice or custom constituting municipal policy. Monell v. New York City Department of Social Services, 436 U.S. 658 (1978), Webster v. City of Houston, 735 F.2d 838, 841 (5th

Cir. 1984) (en banc), Worsham v. City of Pasadena, 881 F.2d 1336, 1339-40 (5th Cir. 1989), Bowen, 669 F.2d at 989-90, Thomas v. City of Houston, No. 91-2601 (5th Cir. 1992). This standard was correctly applied to the facts in this litigation and the Court of Appeals found no basis for municipal liability.

Petitioner argues that municipal liability is incurred under §1983 because the authority to transfer employees was delegated to lower level employees. (Petition at 9-10, 13, 22-23.) Petitioner fails to distinguish between policy-making authority and decision-making authority. Decision-making authority was delegated to lower levels employees to decide where and when to transfer individuals. The underlying policy considerations were not delegated.

Decision-making delegations do not create municipal liability under §1983. Praprotnik, 485 U.S. at 130; Pembaur v. Cincinnati, 475 U.S. 469, 483 (1986).

This Court must look to state law to determine who had policy-making authority in this case. Praprotnik, 485 U.S. at 124. Under Chapter 143 of the Texas Local Government Code, the City's Firefighters' and Police Officers' Civil Service Commission is given authority by the statute to make personnel policy, conduct investigations, and hear appeals of almost every personnel action. Tex. Local Gov't Code §§ 143.008, 143.009, 143.051 to 143.054, 143.117-143.120, 143.127. The City Code of Ordinances requires the Chief of Police to "promulgate administrative rules and regulations of the police department, with

the approval of the mayor, governing the assignments, conduct, equipment, duties, responsibilities and authority of all officers and employees of the department...subject to the approval of the mayor and city council...." City of Houston, Texas, Code of Ordinances §34-23.

It is apparent from these provisions that only the Houston City Council and the Civil Service Commission had final authority to make personnel policy. Praprotnik, 485 U.S. at 127. Even the Chief's authority to promulgate rules was subject to approval by the Mayor and City Council. Therefore, only decisions of City Council or the Civil Service Commission would provide a basis for holding the City liable. Pembaur, 475 U.S. at 483, n. 12.

Thomas cites no evidence that either body delegated to anyone the authority to make personnel policy, as opposed to authority to make discretionary decisions. The fact that the actual transfer decision was made by Defendant Webber is insufficient to impose municipal liability because he had no policy-making authority. To hold the City liable, Thomas had to show not only that a policy-maker approved the transfer decision of Defendant Webber but also "the basis for it." Praprotnik, 485 U.S. at 127. This he plainly failed to do. Therefore, he failed to present any evidence that he was deprived of his First Amendment rights by an official to whom the City had delegated policy-making authority. Accordingly, the Court of Appeals correctly followed the teaching

of Monell and its progeny.

Petitioner further argues that the Court of Appeals has elevated the burden of proof for municipal liability into a grant of absolute immunity. Petitioner provides the Court with his misinterpretation of the state of the law. This Court specifically held that municipal bodies sued under §1983 cannot be entitled to immunity. Owens v. City of Independence, Mo., 445 U.S. 621, 638 (1980). The basis for municipal liability is explicitly presented in Monell and its progeny. Thomas simply failed to prove that the acts complained of were pursuant to policy, practice or custom of the City. The Monell decision has been relied upon by the lower courts

and further clarification is unnecessary at this point.

Petitioner's argument that the present law does not address a situation where a final policy-maker issues a directive to a subordinate to carry out an illegal retaliatory act is unfounded. This Court has indicated that direct liability is appropriate when an injury is inflicted by "lawmakers or by those whose edicts may fairly be said to represent official policy." Monell, 436 U.S. at 694. The Court of Appeals has followed this rule in numerous instances including the present litigation. Examples of other similar cases in the Fifth Circuit include Webster v. City of Houston, 735 F.2d 838, 841 (5th Cir. 1984) (en banc); Worsham v. City of Pasadena, 881 F.2d

1336, 1339-40 (5th Cir. 1989); Bowen v. Watkins, 669 F.2d 979, 989-90 (5th Cir. 1982).

A. The Court of Appeals correctly found that several instances of alleged retaliation are insufficient to create municipal liability if they are not shown to be a deliberate course of action consciously chosen by an official with policy-making authority or are so common as to constitute a custom representing municipal policy.

The Court of Appeals has indicated that a demonstration of a persistent wide-spread practice of illegal acts which are so common that it constitutes a custom representing municipal policy would result in liability under §1983. Webster v. City of Houston, 735 F.2d at 841. Petitioner failed to establish conclusively any instances of retaliatory

actions by the City of Houston. Petitioner's evidence of such behavior was correctly interpreted by the Court of Appeals as insufficient to establish such a custom. The jury in this case made no finding as to the existence of a custom or policy of retaliation by the City of Houston.

B. The Court of Appeals correctly found that no pattern or practice of retaliation for the exercise of protected speech was established by expert and/or historical testimony as to the common practice or procedure within the department.

A plaintiff may demonstrate a persistent wide-spread practice of officials or employees which is so common that it constitutes a custom representing municipal policy. Monell; Webster v. City of Houston, 735 F.2d at 841. Petitioner's

evidence regarding his allegations of a pattern of retaliatory actions by the City of Houston was insufficient to establish the existence of an illegal custom. Petitioner's argument that the City should be held liable because it delegated the authority to make transfer decisions is insufficient because he could not show that the decision itself was retaliatory or, if the decision could have been shown to be retaliatory, that the decision was made by a policy-maker. Petitioner provided other examples of disciplinary transfers within the City of Houston Police Department. Petitioner's argument here fails in that disciplinary transfers are not synonymous with retaliatory transfers because of the exercise of one's constitutional rights. Therefore, they are not evidence of a

custom of retaliatory transfers which would create municipal liability under §1983. Petitioner also points to evidence related to retaliatory acts allegedly occurring in other cities in Texas. These acts, even if true, do not establish such a custom within the City of Houston Police Department, the subject of the present lawsuit.

Petitioner raises the testimony of several officers and Petitioner's expert witness who, he alleges, provided examples of alleged retaliatory treatment. The forty years of retaliatory transfers alleged by Petitioner refers to Sergeant Bill Elkin's testimony regarding the alleged mistreatment of his now deceased father over forty years ago. Many of Petitioner's specific examples of "retaliatory behavior" were legitimate

administrative functions. The Court of Appeals properly found such evidence to be insufficient to constitute proof of a pattern or practice of retaliatory treatment by the City of Houston.

II. The Court of Appeals should not impose vicarious liability on municipalities under §1983.

Petitioner has failed to link the transfer decisions with any policy-maker's decision to retaliate against him. He attempts to saddle the City of Houston with vicarious liability for these transfers under the guise of a "delegation" of the policy-making authority. Policy-making authority is established by state law, not by federal law and is not a question of fact in the usual sense. Praprotnik, 485 U.S. at 124-125. This Court has clearly rejected

respondeat superior liability for municipalities under §1983. Monell, 436 U.S. at 691. Thus, even if Petitioner's allegations regarding retaliatory transfers are true, the City is not liable under §1983.

This Court found that Congress intended that employer liability should arise under §1983 only when the employee's tort is "caused" by the employer. Monell, 436 U.S. at 694. This requirement has been expanded somewhat by the custom or policy issues, but to allow liability in the present case, where no causal connection has been established between the act and any policy-maker, would expand the liability to such an extent that the exception would swallow the rule. The implications of such a ruling would make every police

officer who makes a decision to use his gun on the street, and every municipal employee who makes a decision to drive a vehicle on the job over a particular route at a particular speed, into a policy-maker for whose actions the City would be liable under §1983. Every decision would threaten municipal liability as well as personal liability.

III. Petitioner's presentation of disputed evidence is insufficient to merit this Court's review or require the exercise of this Court's power of supervision.

Petitioner's presentation of disputed testimony and evidence is addressed herein in order to dispel any questions regarding the decision of the Court of Appeals.

Petitioner alleges that the Court of Appeals addressed only the 1983 transfer

in its decision. (Petition at page 16.) The Court of Appeals mentioned only the 1983 incident specifically but noted in its decision that "we can find no basis by which the city can be held liable under §1983 for the acts that Thomas alleged occurred." (Decision of the Court of Appeals at page 3.) The Court of Appeals has not overlooked or misapprehended the facts of this case. The "acts" mentioned in the decision properly include those incidents brought to the Court's attention by the pleadings and the record provided to the Court of Appeals in the appellate procedure.

Petitioner chastises the City of Houston for defending its position by "vigorously objecting" to testimony regarding the June 1981 transfer. (Petition at page 18.) As Petitioner has

indicated, the record consists of over one thousand pages of testimony and Petitioner cites no specific volume or page number for the objection. Respondent's examination of the record revealed only one objection to testimony regarding the June 1981 transfer which consisted of an objection to an unclear question during the testimony of Gilbert. (Transcript, Vol. III, page 42.) The only objection by the City in the direct examination of Thomas was in reference to the introduction of an exhibit. The objection was overruled. (Transcript, Vol. VI, page 185-186.)

Petitioner also chastises the City for making an objection to an exhibit. (Petition for Certiorari at page 18.) The exhibit, which consisted of three tape recorded conversations, were ultimately

admitted by the district court except for what were found to be irrelevant portions. (Transcript Vol. III, pages 94-104.) Examination of the tapes reveals no admissions by Respondent's supervisors, only inflammatory statements by Sergeant Cook, the Houston Police Patrolmen's Union member who made the surreptitious recordings.

Petitioner objects to the City's failure to accept his interpretation of the evidence in the case. (Petition at page 18.) The City of Houston is not required to plead Thomas' case. Thomas submitted a brief and a petition for rehearing outlining his view of the facts in the case.

Petitioner alleges an incriminating statement by Mitchell Gibson. (Petition at page 19.) A review of the transcript

of the tape recording reveals no such admission. (Transcript Vol. III page 101-104.)

Petitioner incorrectly argues that municipal liability is invoked for a wrongful transfer because the Chief of Police gave final approval to the transfer via a response to Thomas' grievance. (Petition at page 20.) Simply going along with discretionary decisions made by one's subordinates, however, is not a delegation to them of the authority to make policy. Pembaur, 475 U.S. at 481. The Court of Appeals determined that the jury found Defendant Webber, one of those individuals included in the definition of Defendants, to be the individual who made the decision in question. The Court of Appeals correctly determined that Defendant Webber was not

a final policy-maker and thus no municipal liability attached.

Petitioner attempts to distort the issues of this case by making the terms "discriminatory transfer" and "disciplinary transfer" synonymous. (Petition at page 22.) A disciplinary transfer is not illegal per se. This administrative tool allows a supervisor to move an unproductive employee to an area where they could better serve the department and increase their productivity. This personnel action is a positive use of the transfer process. Petitioner attempts to equate this type of action with an alleged transfer made in retaliation for asserting a constitutional right. The majority of the testimony cited by Petitioner refers to disciplinary transfers and not retaliatory or

discriminatory transfers. The Court of Appeals recognized this distinction and found no policy or custom of retaliatory transfers.

The fact that Lieutenant Gilbert, given his 28 years of service, found the transfer of Thomas to be unusual (Petition at page 22, 23 and Transcript, Vol. III, pages 34-35.) tends to further refute Petitioner's allegations of a widespread custom or practice of making such transfers. Expert witness Ron DeLord's statements referred to problems with cities throughout Texas but included no specific examples regarding retaliatory transfers within the City of Houston Police Department. (Petition at page 24 and Transcript, Vol. II, pages 80-84.) The testimony of Sergeant Bill Elkin about problems his now deceased father

had with the Police Department over 40 years ago (Petition at page 23 and Transcript, Vol. III, pages 53-56.) is hearsay testimony of a singular incident which would not be sufficient, even if true, to constitute evidence of a discriminatory custom or practice. Webster v. City of Houston, 735 F.2d at 841.

Petitioner alleges deprivation of his seniority rights on January 24, 1983 because of the assertion of his First Amendment rights. (Petition at page 25.) However, this claim is based upon the same transfer decision made by Defendant Webber. The Court of Appeals determined that it was not a basis for municipal liability.

Petitioner alleges an admission by Fred Bankston that he recommended

disciplinary action against Thomas because of his conduct at a 1981 union press conference. (Petition at page 26.) Bankston's testimony was that he did not threaten Thomas with suspension or anything else. (Transcript, Vol. II, pages 168-171.) He also stated that he knew of no discriminatory action taken against Thomas. (Transcript, Vol. II, page 190.) The only disciplinary action he was aware of was a recommendation for disciplinary action originating with Captain Thompkins. (Transcript, Vol. II, page 190.)

Petitioner alleges that Defendant Webber was specifically delegated the authority to implement Petitioner's transfer. (Petition at page 27.) The Court of Appeals' review of the case below revealed no basis for municipal

liability, implicitly rejecting Petitioner's premise that a delegation of decision-making authority is a sufficient basis for municipal liability. Petitioner confuses the concepts of policy-making authority and decision-making authority Praprotnik, 485 U.S. at 130, Pembaur, 475 U.S. at 484 n. 12. The lieutenant was delegated the decision-making authority to make appropriate transfers but was not delegated the policy-making authority of retaliating against those who exercised their constitutional rights.

CONCLUSION

The Petition for Writ of Certiorari should be denied because the Fifth Circuit correctly applied this Court's decisions for determining municipal

liability. The Fifth Circuit correctly reversed the District Court's imposition of municipal liability in this case.

Respectfully submitted,

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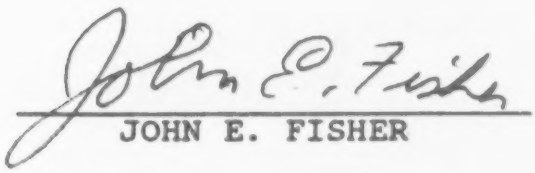
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that three true and correct copies of the above and foregoing Respondent's Brief of Opposition have been mailed, certified United States Mail, return receipt requested to counsel for Petitioner, LAURENCE W. WATTS, 1909 Morgan, Houston, TX 77006 on this the 2nd day of February, 1993.



JOHN E. FISHER

APPENDIX

APPENDIX

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1. DELORD TESTIMONY EXCERPT.....	33
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A-001A

than discipline cases. There were a lot of issues involving residency, rights to political activity. Just a lot of trying to get some type of control over or direction of the police profession.

Although Houston itself did not hire people without training, large portions of the police in this state were untrained before they were put to work. Poor background investigations. There was just a lot of working condition problems that all the police organizations were trying to get changed to improve the profession through the legislature.

There was just a lot of unrest all through the '70s stemming, a lot of it from the Viet Namn war, protests that the

Continue...

police had to deal with. And then the outcome of having huge number of Viet Namn veterans come into police work in this period, many of who were not as -- well, I would say they are disciplined militarywise, but they were used to seeking change. So there was a lot of unrest going on in the police all through the late '60s and early '70s.

Q During the time that led up to 1979 and the formation of the Houston Police Patrolmen's Union, and even after that, were there identifiable, discernible, disciplinary techniques that management in the police department, the command staff, could use to silence criticism of policies or acts?

MS. RUSSU: Excuse me, Your honor, I am going to object unless a specific city is put to the question.

THE COURT: Okay, I will sustain the objection.

MR. WATTS: All right, sir.

THE COURT: Establish knowledge of this witness on matters relevant to this case.

BY MR. WATTS:

Q Are you aware of any -- are you aware of any cities or towns throughout the state of Texas where their police departments-where in there police departments command officers use identifiable or discernible techniques to silence criticism of command actions or policies?

A Yes, sir.

Continue...

Q Could you name -- and I am sure we can stay here all day but we don't want to do that. Give me if you could a representation of those cities or towns and those examples that your are familiar with personally.

A This is in the same time period, pre-1982, right in the Villages which are three suburbs here in Houston, officer posted a notice on the bulletin board for the officers to join CLEAT, the police association. Within days, he was ordered to take it down. He was given a 15-day suspension because his a.m. radio was playing over his police radio. When he got to his hearing, they terminated. He later settled that case out in court.

Another officer posted notice about joining the police association. The Chief posted the ten names. They sent-

an undercover officer into the meeting, posted their ten names in the temple. Within a few weeks, the officer was terminated for spreading rumors in the police department.

An officer in McAllen, Texas, his telephone was bugged when he became president of the association and he later sued and won a judgment or settlement against the City. They tapped his telephone to find out if he was talking about the Chief and the administration in the Department.

And three officers in Crocket, Texas, I stopped by to visit with them personally one day. The Chief walked out of the Department, saw me talking to

Continue...

them, and the next day they fired all three of them. They won their case, got their jobs back, in federal court.

I can give you city after city officers were transferred, disciplined, terminated, all over issues involving free speech.

Q I want you to ask you about Houston. Can you tell me of any instances that involve Bob Thomas or the City of Houston Police Department where you have seen such identifiable or discernible disciplinary tactics used by command officers?

A I am aware of his transfer to the property room after being involved in association business and going to the legislature and being involved in several conflicts with the staff. Also just, you

Continue...

know, other retaliatory things. Just recently, the association didn't back the mayor of the City and the mayor cut

their political action checkoff down at the City which is voluntary, as retaliation.

Q What is political action checkoff?

A The police association and union have checkoff rights when members want to donate to their political action committees. After they did not endorse the mayor and backed Hofheinz, the mayor cut their checkoff. And so they couldn't collect dues to give money to other candidates.

She has a right to do it but it was retaliation for their being involved in politics not her politics.

Q Let me talk to you for a moment about transfers. Have you seen transfers of

Continue...

officers used by command staff to discipline their officers who were critical of the command?

A Well, they are the most common use in police work is transfers under Civil Service or any system, even probably under our bargaining contracts. There is no appeal of a transfer. We don't have, like in the private craft unions, there is not a lot seniority guarantees. Maybe vacation or off days. But as far as your job assignments, you serve at the pleasure of the Department.

And you know, I personally was involved in that as president of Mesquite Police Association. And I was in organized crime task force for 12 months. Eight months I was a detective. We had a meeting with the City manager about the

Continue...

way overtime was disbursed and I got in an argument with my

Captain at this meeting with the City manager. And 5:00 that afternoon I was on midnight patrol. That is just a message to people. Officers are constantly put in what are basically -- in FBI, you used to hear of the J. Edgar Hoover days, sent to Montana. In the police department, it is the property room, the auto pound, In Mesquite, they would send you out to the airport, down to the property room. Whatever, you know, that is the way it can be dealt with. There is no way to appeal those under state Civil Service.

An officer just a few weeks ago won a judgment and it is on appeal in Waco, Texas, won 1.4 million in a jury trial

Continue...

for being transferred. That was just in the last few weeks. So officers are still being transferred and punished every day. That is the most common means of discipline.

Q Does the public have an interest in what goes on in terms of transfers, in your opinion, within the Police Department?

MS. RUSSU: Your Honor, excuse me. I don't know that this witnesses is a psychologist or trained in psychiatry or knows what people in general are thinking. I think we've let this go far afield.

THE COURT: I will sustain the objection.

BY MR. WATTS:

Q Your are not a psychologist?

Continue...

A No, sir, I am not.

Q. Your are not a psychiatrist?

said, I am not going to answer any questions. Over and over, said I am not going to cooperate.

Q How long did this meeting last?

A Exactly one hour and a half.

Q How do you say exactly?

A Because there was two sides to the tape. And each side put together make one hour and a half.

Q Was it complete on both sides?

A Almost complete. I believe, on the one side.

Q And you said you explained the purpose of them meeting?

A I told him over and over that the -- this was a personnel investigation. It was not a criminal investigation. I

Continue...

explained that to him over and over. And he said he understood. He even told us that he understood that he should cooperate. He said, I understand that, but he said, I'm not.

Q. Did he say anything to you about going to the grand jury when you suggested it?

A He just smiled and laughed that off. Never said anything. As well as I can remember, he just ignored it.

Q Were you serious when you made that recommendation to him?

A Yes, ma'am, I was dead serious. To me, when someone makes an allegation that there is a gigantic coverup, that is a very serious allegation. And I though it should be handled and still do.

Q Did you threaten to fire him, Chief?

A I did not. The tape -- the transcript and the tape would show he was never threatened with suspension or anything else.

MR. WATTS: Excuse me, Your Honor, I am going to object to any further reference to a tape. First of all, there has been no tape ever mentioned by the defendants on their exhibit list. There has been no transcript of a tape ever mentioned on their exhibit list. This is the first revelation we've heard of such a type, if such a tape exists. It was elicited by counsel for the City through leading questions. And I think that we are -- that we are compelled to object to any further attempt to parade before this

Continue...

jury some piece of evidence that they have no intention of presenting because they never disclosed it before today.

THE COURT: Do yo have a tape and transcript you intend to introduce into evidence?

MS. RUSSU: yes, we do, Your Honor.

THE COURT: Well, he certainly can be asked questions concerning conversations he had there, whether taped or not. Let's proceed on with that.

MR. WATTS: Your Honor --

THE COURT: I will take up the issue of the admissibility of the tape later. Question the witness abut what Mr. Thomas may have said during that conversation. It makes no difference whether it was taped or not unless you offer the tape.

MS. RUSSU: Exactly right. And we will later, Your Honor. I just want to establish it through this witness.

THE COURT: All right.

BY MS. RUSSU:

Q Now, during your conversation with Officer Thomas, did he ever make any allegations that you personally were involved in a coverup?

A. No, ma'am. Not that i recall him ever making a comment. I wasn't the one that was supposed to be covering it up. It was apparently, from his point of view and what his statements were, that IAD was making a gigantic coverup.

Q Now, when you say his statements, you are referring to press statements?

Continue...

A Press release and the radio statements that he made.

Q He didn't tell you during the conversation who he was talking about was covering up?

A he wouldn't cooperate. He wouldn't tell us. He wouldn't tell -- Tompkins asked him a number of times.

Q Did you ever give him a direct order to answer your questions?

A Yes, I did.

Q And what did he say when you gave the directive?

A I am not going to do it.

Q And did he allege any involvement in a coverup by any one of the defendants listed in this case?

A No, ma'am.

Q Did he ever any time in this conversation or anywhere else say to you that any of these folks listed in the lawsuit had done anything in their personal capacity as opposed to official capacity?

MR. WATTS: Excuse me, Your Honor, We object. That is a question of law. It is invasion of the province of the Court.

THE COURT: I will sustain the objection.

BY MS. RUSSU:

Q Now, did you ever have anything to do with the assignment, that time or any

Continue...

other time, of Officer Thomas?

A Well, as I have explained before, when Sergeant Woodruff and Captain Gibson made the recommendation for him to moved from Narcotics to Patrol, I signed off on it because that is the normal procedure through the police department to do. I did that.

Q Right. In addition to that, did you have anything else to do with any transfers or reassignments?

A If I did, I can't remember it. I don't know of any time that I ever had anything to do with him personally being transferred. Even after the incident that we are talking about here, I didn't.

Q Now, to your knowledge, did Officer Thomas file a grievance when he was transferred to Central from the property room?

BY MS RUSSU:

Q Chief Bankston, do you have any knowledge of any of the defendants who took part in any kind of discriminatory action against Officer Thomas?

A No, I do not.

Q Any adverse personnel action at all?

A No, ma'am, not at all.

Q Now, you mentioned a letter that Captain Tompkins had written that went through you, the letter requesting discipline, I believe?

A That is correct.

Q How, did that letter go anywhere else that you know of?

A. Yes, ma'am.

Q And where was that?

Continue...

A That would be through the chain of command again, Captain, Deputy Chief, Assistant Chief, to the Chief.

Q Oh, okay. Was it sent anywhere else for review?

A The letter per se, Yes. Yes, it was.

Q Okay, was it sent for an opinion somewhere?

A It was sent to the legal department, City Hall for an opinion.

Q And why was that?

A The chief sent me a copy of his letter and it stated that due to the circumstances that Mr. Thomas was the president of the union, that he was going to request a legal department

A If I recall correctly, that he and I were to report to Chief Gibson's office at 2:00 on the next day, I think it was.

Q To discuss what?

A I don't believe that the topic was specifically given to me.

Q Did you have a perception of what the topic was to be?

A I would assume it was the union activities.

Q Did you instruct Thomas to bring all of his gear?

A Not that I recall.

Q It is possible that you did?

A It is possible, but I don't really recall it.

Q During the time that you were in the

Continue...

-- in charge of Thomas, there came a point where Thomas was transferred out of the Property Room; is that correct?

A Yes, sir.

Q Was he transferred out on your recommendation?

A No, sir.

Q Was he transferred out with your permission? By that I mean did anybody come ask you?

A No, sir, they did not.

Q Was he transferred out by orders from command staff on high?

A The instructions to transfer him came from my Captain. I don't know where he received the instructions.

Q And who was your Captain?

A Goodrum. E.B. Goodrum.

Q Had that ever occurred before during the years that you had been in charge of the Property Room?

A A transfer out?

Q Yes, sir, without your permission or without your recommendation?

A No, sir.

Q So it was unusual?

A Yes, I guess you might say that.

Q Does your wife also work for the police department?

A Yes, sir.

Q Are you now simply trying to get to retirement?

A Oh, I've got my retirement made.

Q When are you going to retire?

Continue...

A After the first of the year.

MS. WATTS: No further questions.

CROSS EXAMINATION

BY MS. RUSSU:

Q Lieutenant, does everybody in the police department consider the Property Room a dead-end job?

A I couldn't speak for everybody, ma'am.

Q Do you consider it a dead-end job?

A Well, I finally got out, so I guess it is not dead-end.

Q And as to -- as to Officer Thomas, are you -- do you know whether he at any time asked to be assigned to the Property

wrong, it is so long. APOLA?

A I don't know, ma'am.

MS. RUSSU: Excuse me just a moment. Pass the witness, Your Honor. Thank you.

THE COURT: Al right, Mr. Watts.

REDIRECT EXAMINATION

BY MR. WATTS:

Q Two questions. During the time that you were -- well, in your 28 years as of that time that you had spent in the police department back in 1981 when you last had Thomas under your charge, during those years that you had been on the police department up until that point in time, had you ever perceived anyone other than Bob Thomas being transferred for

Continue...

disciplinary reasons or was he the only one?

A No, I've seen others.

Q Have you?

A Yes, sir.

Q And were they transferred for disciplinary reasons by command staff in the same way that Thomas was?

MS. RUSSU: Object to the question as being unclear, Your Honor.

THE COURT: I will overrule the objection.

THE WITNESS: On a couple of occasions, yes. Ever since I have been a police officer, there's been involuntary transfers. I don't know how you would say that, but I mean

A Yes, sir.

Q Now, what was the importance of -- and this is -- of the grievance bill to the Houston police officers and to the public?

A From the officer's point of view, a grievance procedure was needed because there was little or no way that they could address grievances within the Department and feel that it would get to the appropriate place that it should ultimately end up, and that is with the Chief's office. It was a vehicle that we saw in order to substitute some uniformity and consistency in a grievance within the Department.

Q Was that important, do you think, to

Continue...

the public?

A I think the public would benefit from it because the officers -- I think it would increase morale within the officers and I think the benefit would then extend to the general public, yes.

Q Was there any way to appeal punitive or disciplinary transfers without a grievance procedure?

A At the time we didn't see there was one. There as none.

Q No way. And there were punitive or disciplinary transfers that had historically occurred in the police department, weren't there?

A There had been, yes.

Q In fact, as far back as when you dad worked there?

A Oh yes.

Q I believe you shared with me that he had been targeted for one of those?

A Yes.

Q Now, you and Thomas represented in Austin competing interests or different organizations, rival organizations, didn't you?

A We competed for the same recourse.

Q You had the same objectives and same goals?

A Yes.

Q Went about it in a different way?

A I think that is a safe assessment.

Q How did Bob Thomas go about it?

A In my opinion, I think that he wanted to speed it up. That he wanted the shortcuts. We are accused of being a

Continue...

little more laid back. We wanted -- we felt that we could accomplish as much in a -- probably a little softer manner by doing a little more talking, a little less acting.

Q Did Thomas behave professionally and with professional interests in mind, in your opinion?

A To my -- yes, to my knowledge, he always conducted himself in a professional manner the times that I had occasions to be with him, work in conjunction with the same goals with him, yes.

Mr. WATTS: Sergeant, thank you very much.

Pass the witness.

THE COURT: Ms. Russu.

MS. RUSSU: Thank you, Your Honor.

CROSS EXAMINATION

BY MS. RUSSU:

Q Sergeant, how long has Mark Clark been president of HPOA?

A He succeeded me in 1985.

Q And he has been president ever since?

A He has been president ever since then, yes.

Q I see. Is there a departmental rule against an officer appearing for a political purpose wearing a uniform of the police department, do you know?

A Yes, I think there is. To my knowledge there is.

Q Do you know whether Mark Clark, in the last election, appeared on television

Continue...

wearing his police uniform supporting a candidate for office?

A I am not sure.

Q Oh. Okay. Now, have you heard - well, first of all, your daddy was back in, what years he formed it, in '47?

A '47. 1947, yes.

Q And how long - when did he leave the police department?

A He retired mandatory age in 1969.

Q Had the mandatory age?

A Yes.

Q And when did he have this problem because of his union activities?

A It was back in the late '40s, early '50s. I don't recall

the specific date.

Q I see. Not any time recent?

A. Oh, no, he's been dead for a number of years now.

Q Oh, I see. Have you ever had any problems with that, Sergeant?

A. I personally have never had a problem.

Q. Did you ever have a problem with any of the people sitting here over your union activities?

A No.

Q How about Chief Mitchell?

A Never.

Q Chief Bankston?

A No.

Q You said something that I am not clear

Continue...

about, Sergeant. When you were asked about the formation of the union, you said there was another organization, but HPOA had the majority of the members.

A Well, there has been the black organization, the Afro American Police Officers League. They have been in existence for some time.

Q I see. Do you know what year they were formed?

A No, I sure don't.

Q Who formed that union?

A I have no idea

Q But it was in place in '79, you say?

THE COURT: Anything further?

MS. RUSSU: Nothing further, Your Honor.

THE COURT: Okay. All right. Come up here, counsel . (At the bench)

THE COURT: Some of this, a lot of this is not relevant. What I am going to do though, while Wunsche's tape is being played, I am going to admit Wunsche's tape, parts of it. You can start --

MR. WATTS: Let me get a copy, Your Honor.

THE COURT: Okay.

MR. WATTS: Your Honor, I made extra copies of the transcript for the jury to read as a jury aid. We have an admission it is substantially true and correct. **Continue...**

THE COURT: Just a second. Okay. I am leaving some of this stuff in about the Chief in Austin because it has been testified to. But Wunsche's tape -- these pages are not numbered. Page six. Going --

MS. RUSSU: Starting at six.

THE COURT: Going down to six. From the beginning, go down to right there an Wunsche's testimony and stop on six at that spot.

MR. WATTS: At "50 percent".

THE COURT: Yes. He starts talking about a bunch of other stuff after that. I'll read the next tape while you are playing that one. I will overrule the objection and I'll admit

the tape of Chief Wunsche. It can be played to the jury through the part that I have marked on the written transcript and will instruct counsel to stop the tape at that point. Just play it that far.

MR. WATTS: Your Honor, may I have just a few minutes to make sure there is not anything else? Have you read the entire transcript?

THE COURT: I have read the entire transcript.

MR. WATTS: If I clip off everything else on Wunsche on copies I have, could the jury use as the jury aid the transcript?

THE COURT: I would rather them hear

Continue...

the tape and then we may send -- I am not sure what I am going to do yet. I would rather them hear the tape. I think it is important if we are going to play the tape they hear and listen. I haven't heard the tape but are there parts that are not clear?

MR. WATTS: No, I think --

MS. RUSSU: It is pretty much clear.

MR. WATTS: It gets a little fuzzy in places.

THE COURT: Do you have an objection?

MS. RUSSU: No.

THE COURT: Do you want them to look at the transcript?

MS. RUSSU: No, I am answering your question. I don't see a problem with the tape. I think they pretty much hear it.

The small differences are so small that it doesn't matter to either side. One is a typo.

THE COURT: Kind of like reading a deposition. You know, anyway, let's try it with the tape.

(In open court)

DIRECT EXAMINATION (continued)

THE COURT: Ladies and gentlemen, I am going to allow the tape that Don Cook took with Wunsche. There are parts of it I don't feel are relevant to this lawsuit and he is suppose to stop it at that point. You will hear what I feel should be played.

Since I've read it, I will be reviewing the next tape and see if we can **Continue...**

do the same thing on it and eliminate anything that is not relevant.

You may proceed.

(Cassette tape played in open court)

MS. RUSSU: Excuse me, Your Honor, that is supposed to be the end of the tape.

THE COURT: Stop the tape a minute.

MR. WATTS: No, that is page five. That is "50 percent" you said stop. We are still going.

THE COURT: I said stop it on page six after "50 percent". Where are we?

MR. WATTS: We are on page five. Half way down page five. Cook just got through saying, "Well, some people are

going to see it as a problem. It is going to force them to get off their rear ends and start engineering their bureaus."

MS. RUSSU: That is correct, Your Honor. Counsel is welcome to back it up a little bit if he wants because of my interruption.

(Cassette tape continued)

MR. WATTS: All right, Your Honor, that concludes that portion.

THE COURT: Okay. Daigle is next?

MR. WATTS: Yes, Your Honor. But I am going to have to probably find Daigle where it starts on here.

MS. RUSSU: Oh, I see what you mean. Daigle does follow Wunsche but he has to

Continue...

go through several pages.

THE COURT: All right.

MR. WATTS: If the Court will give me just a moment.

THE COURT: Okay.

MR. WATTS: Now that next starts, Your Honor, is Daigle.

THE COURT: Ladies and gentlemen, it is virtually impossible with the equipment Mr. Watts has to edit it. But there is some of this that is not relevant. We are going to try to edit it in bunches so we can find it.

(At the bench)

THE COURT: Again, numbering his pages. Start the tape, play it over to page two and stop it after the first

paragraph by Chief Daigle. Where he says--

MR. WATTS: "Really I don't."

THE COURT: "Really I don't." Stop there. Did you get it?

MR. WATTS: All right, sir.

THE COURT: All right. Omit page three, omit page four.

On page five at the middle of the page, begin it where Don Cook says, "How did Bob's name get brought up at the staff meeting?"

MR. WATTS: All right sir.

THE COURT: If you catch some of the Chief's previous answer, that is fine. It is not going to be an exact the way you find it on that tape machine. But

Continue...

then play it from there -- play the rest of the tape. Seven, eight and nine.

MR. WATTS: All right.

THE COURT: For the record, I will overrule the objection to the playing of the tape between Don Cook and Chief Daigle except for the parts designated on the written transcript.

(In open court)

THE COURT: There is a taped conversation between Don Cook and Chief Daigle; is that correct?

MR. WATTS: Yes, Your Honor.

THE COURT: All right you may proceed.

(Cassette tape played in open court).

MR. WATTS: All right, your Honor. I am stopping at the first pause and I will try now to --

THE COURT: You are on page four?

MR. WATTS: Yes, sir.

(Cassette tape continued)

THE COURT: Stop it there. The rest of it is not relevant.

MR. WATTS: All right, Your Honor.

THE COURT: I don't think there is any other reference to the incident in question that I can see.

MR. WATTS: No, Your Honor, I don't see it either.

THE COURT: All right, we will stop it there. Appears to only be a short

Continue...

part of this next tape that is relevant. Do you want to come up. I will show you that. We will take a break after that.

(At the bench)

THE COURT: On the Gibson tape, start it off on page one. Page two. And on page three, let's stop it after what Gibson says. That is the third paragraph from the top. Actually the first full paragraph of Chief Gibson on three. That would be where you would stop after starting it --

MR. WATTS: On that page, are you talking about right here?

THE COURT: Yes.

MR. WATTS: or down here?

THE COURT: Right up here. Stop it up here.

MR. WATTS: Okay.

THE COURT: Then we go over to page four. Up from the bottom, you've got -- start it with Chief Gibson's next to the last paragraph where it says, "Oh, I was just going to say that one member of the staff --" start it there. Go over to page five and stop it at the end of tape. If that is what that is. If Chief Gibson says, "Yes, that is the end of the tape." Stop it there. I don't think the rest of it makes any difference. Okay?

MR. WATTS: All right, sir.

MS.RUSSU: Where is the last

Continue...

stopping place, Your Honor?

THE COURT: The end of the tape. Let the record reflect that the defendants' objection to the playing of the tape between Don Cook and Chief Gibson is overruled except for the parts designated on the written transcript that will not be heard by the jury.

(In open court)

THE COURT: This a tape conversation between Don Cook and Chief Gibson.

(Cassette tape played in open court)

MR. WATTS: Your Honor, just a little lead-in. But I don't think I am going to be able to precisely. Here is

where it is right here. That is the next word and here is where we start off. The Court told me to start here and this is where I am right here. Should I try to fine tune it a little closer?

THE COURT: Run it a little closer and play it. Won't make any difference.

(Cassette tape continued)

MR. WATTS: Your Honor, may be a good time to take a recess. There is another copy fortunately.

THE COURT: Can I make a suggestion?

MR. WATTS: Yes, Your Honor.

THE COURT: The only thing that is left is equivalent to about one page. Why don't we just read it?

MR. WATTS: That may be wise, Your

Continue...

Honor. May we have the copy that we have given to opposing counsel of the tape to substitute in evidence?

THE COURT: You may. Read the few lines.

MR. WATTS: "Chief Gibson: Oh, I was just going to say that one member of the staff said something to the effect that where I come from if someone calls you sorry, he better be able to defend himself. You know, those are fighting words."

"Don Cook: Well, evidently I am going to have to do that this next edition, explain what I meant in more detail.

"Chief Gibson: Well, it did cause some ill

feelings.

"Don Cook: I would --

"Chief Gibson: I think that I probably reacted to it less than most. So what I am telling you is probably the conservative point of view. (Laughter)

"Don Cook: Yeah. Well, I say this -- I would say this, it wold seem they would go out of their way to prove me wrong, but by transferring Bob in what proves to be retaliatory harassment-type transfer, they do nothing but prove me right.

"Gibson: Well, like I said a moment ago, now if you think the reason for transferring Bob is that article, then you are wrong, it isn't.

Continue...

"Don Cook: Well, I think it is a combination of things.

"Chief Gibson: Yeah, it is a combination of things, I would agree to that.

"Don Cook: I think that the consensus of opinion up there was probably that we better put the boy in his place?

"Chief Gibson: Well, that wasn't said.

"Don Cook: But it was the attitude, right?

"Chief Gibson: No, I wouldn't say that that was the attitude. (Laughter).

"Don Cook: Well, until we get evidence to the

contrary, that is the way it appears to us, that it was retaliation for a variety of things which still doesn't make any sense. That is just going to make him rededicate himself to come on harder than he has before.

"Chief Gibson: Yes."

End of tape.

THE COURT: All right. Let me see the lawyers at the bench.

(Discussion off the record)

THE COURT: Ladies and gentlemen, we will take an afternoon recess at this point. We will take 20 minutes. If you will return to the jury room about 3:30.

(Recess)

(Jury present)

Continue...

THE COURT: You may resume.

MR. WATTS: Thank you, Your Honor.

BY MR. WATTS:

Q I had a couple more questions and then I will conclude, Lieutenant. In the conversation that you had with these Deputy Chiefs, I specifically would like to -- do you have a transcript up there?

A Yes, sir.

Q I am going to direct you to your conversation with Deputy Chief Wunsche, I believe. And in there, there was a remark that Deputy Chief Wunsche made where he said something about --

he asked you if you were going to bug him. Just a moment. Let me see if I can -- do you know what I am talking about?

A Yes, sir.

Q I believe you said that you weren't. What was that all about?

A Well, I had known Chief Wunsche approximately nine years when this occurred. The question was asked earlier if anyone asked if they were being recorded and I said no, they didn't. But this could be taken that way. But knowing Chief Wunsche as I had nine years, he said I would appreciate it if you are not planning on bugging me. I took that to mean you are not planning on writing anything about me in next month's

Continue...

paper or mention me specifically or writing any derogatory comments. And my comment was, no, my comments won't be directed to any particular person. This was to let him know I was finding out background. I was not planning on going after him personally.

Q Did you historically tape record conversations? Why did you do this, Lieutenant?

A For my own protection because I was doing an investigation on behalf of the union and if I quoted anybody and they denied what I said they said, I wanted it as proof that it was they who were not telling the truth and not me.

Q Now, that takes me to particularly the conversation you had with Chief Gibson. I would like for you to turn to the

Continue...

second page of that transcript. And I would like for you to look at

McConn had called Chief Caldwell and that the meeting would never occur, and that I was to come by and see him and introduce myself and meet him and he would talk to me in the next couple of days.

Q So here we are in 1981 now and you've gone public against Bankston's friend and you are under Bankston's charge?

A Yes, sir.

Q What happened next?

A Well, Bankston had a press conference and he released that he had conducted an investigation and turned his recommendation over to the Chief and I think City Legal.

Q I am showing to you what has been marked as plaintiff's exhibit 16. Is

Continue...

this the press conference where Bankston says that he was investigating you?

A Yes, sir. It was all over the radio. This was an article out of the Post again dated December 18th in which he is quoted that he investigated me.

MR. WATTS: We offer into evidence plaintiff's exhibit 16.

MS. RUSSU: Your honor, we are going to object to the exhibit. This came up earlier and we are reminded that when Chief Bankston was here, he testified that as a matter of fact, he had with him a copy of what he said he had released to the paper. And said that this was not it. And we object to it on the grounds of authenticity.

MR. WATTS: On authenticity, Your Honor, I think it is properly documented. Same limiting instruction, Your Honor.

THE COURT: All right, I will overrule it and I will admit 16. You are given the same admonishment about this, ladies and gentlemen. It is not being admitted to prove the matter stated therein, simply that it was a newspaper article that was published on or about that time.

BY MR. WATTS:

Q In that newspaper article, Mr. Thomas, it says that a Deputy Police Chief said Thursday he has made a personal investigation of the Houston Police Patrolmen's Union president because the

Continue...

union leader alleged a coverup is involved in allegations against an assistant police chief. Do you remember that?

A Yes, sir.

Q Do you know why Chief Bankston felt like it was necessary to go to the press and tell them that he was investigating you after you had called for an investigation of his friend Mitchell?

MS. RUSSU: Object to the form of the question, Your Honor. There is no evidence to support the question as asked.

THE COURT: I will sustain the objection.

BY MR. WATTS:

Q Did you ever ask Bankston why he was -- why he went to the press saying he was

Continue...

investigating you after you had called for